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COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

VERBATIM RECORD OF THE 3rd MEETING

Held at Headquarters, New York,
on Friday, 13 February 1991, at 10.30 a.m.

Chairman: Mr. TOMKA (Czechoslovakia)

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The meeting was called to order at 11.10 a.m.

The CHAIRMAN: The present public meeting of the Committee on Applications for Review of Administrative Tribunal Judgements has been convened pursuant to paragraph 4 of article VII of the rules of procedure of the Committee, contained in document A/AC.86/2/Rev.3. That paragraph provides as follows:

"The decisions of the Committee and the text of any questions to be addressed to the International Court of Justice, as well as the results of and the participants in any votes taken during the private deliberations, shall be formally announced in a public meeting, at which any member of the Committee may make a statement for the records."

As the Committee knows, we had two applications during this session. The first was the application of Mr. Fayache. The Committee on Applications for Review of Administrative Tribunal Judgements considered the application of Mr. Fayache at its closed meetings held on 9 and 11 September 1991.

Before the Committee proceeded, on 11 September 1991, to take a decision on the application of Mr. Fayache, the representatives of Egypt, Indonesia, Lebanon, Senegal and the United Arab Emirates stated that they would not participate in taking a decision by the Committee with regard to the application of Mr. Fayache.

Following these statements, the Committee proceeded to take a decision on the application of Mr. Fayache.

The Committee decided that there was not a substantial basis for the application of Mr. Fayache under article 11 of the Statute of the Administrative Tribunal and that therefore the International Court of Justice should not be requested to give an advisory opinion in respect of Judgement

(The Chairman)

No. 507 delivered by the United Nations Administrative Tribunal in the case of Fayache against the Secretary-General of the United Nations.

Does any member of the Committee wish to make a statement for the record?

Ms. ZAZOPULOS (Chile) (interpretation from Spanish): Our delegation would like to emphasize once again the appropriateness - made evident by a study of the cases presented to this Committee and specifically by the counsel to Mr. Fayache - of having a tribunal or body of appeals with the jurisdictional powers necessary to respond to the applications of the Organization's staff members who believe that their rights have been infringed.

We therefore understand that article 11 of the Statute of the Administrative Tribunal is not adequate in this respect.

Mr. SY (Senegal) (interpretation from French): Since the mandate of my country's delegation expires with this meeting, I should like at the outset to say how pleased I have been to work with you, Mr. Chairman, and how appreciative of the way in which you have conducted our work. We have also learned a great deal from the other members of the Committee, which provides for exchanges of views and these should be seen as taking place in a spirit not of antagonism but of simply trying to come closer in reflecting our conscience. I would also like to extend my heartfelt gratitude to the Secretary of the Committee, his colleagues, and all those who have participated in the Committee's work.

Having said that, the Senegalese delegation did not participate in the decision on the case of Mr. Fayache, not because we wished it to be brought before the International Court of Justice, but because the matter has more

(Mr. Sy, Senegal)

merit in helping us to evaluate the Organization's system of staff management than it does as a legal case study. Indeed, that was not so, since we know that promotion is not an acquired right nor a legitimate demand for any staff member, whoever he may be.

(Mr. Sy, Senegal)

We appreciated the analysis of the judgement, because it demonstrated more clearly these shortcomings in the administration of the Secretariat. In other words, my delegation, while not participating in the decision, was very pleased, for it was convinced that the Secretariat would take due account of our discussions and think about its method of conducting the business of managing the staff, not because promotion was demanded for one staff member, but because justice was done and because a conclusion was reached in accordance with the rules and regulations.

In view of all these facts, which were taken into account in the judgement, in all conscience, my delegation felt that it could not, as the Tribunal asserted - and I respect that - agree that whether or not procedure included irregularities the judgement would have remained the same.

In any event, in all conscience we could not be convinced that that was the case - but we repeat that we respect the judgement of the Tribunal. However, we did feel that it was preferable for us not to participate in the decision taken, it being understood that the lessons to be drawn from our discussions will, we hope, be heeded by the Secretariat.

Mr. HANAFI (Egypt) (interpretation from Arabic): Since this will be the last meeting in which my delegation participates in this Committee, we should like to thank you, Mr. Chairman, most sincerely for the manner in which you conducted the business of this Committee during its deliberations on Mr. Fayache's application. I would also like to thank the Legal Counsel, who participated in our meetings. My thanks go as well to the Secretary of the Committee for his efforts, which have been beneficial to our discussions.

(Mr. Hanafi, Egypt)

Mr. Chairman, you indicated that our delegation has not taken part in the decision of this case. Indeed, in deciding not to participate, my delegation has done so advisedly, in full knowledge of the facts and after a very careful study of the case. After deep reflection, the delegation of Egypt decided not to take part in the decision on Mr. Fayache's application. In discussing the application, my delegation chose its words very carefully and the wording of the statement it made in explanation of the reasons which led it to find the judgement rendered by the Tribunal unconvincing was meticulously chosen. However, the fact that we found the Tribunal's judgement unsatisfactory is not sufficient in itself, since the Committee, as we know, is governed by the Statute and Rules of the United Nations Administrative Tribunal. However, even the Statute, as defined in article 11, paragraph 1, does have certain ambiguities.

Therefore, I would like to take this opportunity, in this public meeting, to explain why my delegation adopted the position it did. First: in its view, the judgement on this application has certain deficiencies. In its judgement, the Tribunal drew attention to those deficiencies and to the administrative irregularities with regard to Mr. Fayache's promotion. However, the Tribunal's judgement did not address the aforementioned administrative irregularities.

Secondly, the Tribunal, in its judgement, refers to Article 8 of the Charter, concerning the eligibility of men and women to participate under conditions of equality in the principal and subsidiary organs of the United Nations. To my knowledge, as a matter of fact, the Tribunal spent a long time discussing this Article at length and examined the guidelines of the General Assembly with regard to the priorities of appointing women to United Nations posts.

(Mr. Hanafi, Egypt)

Regardless of the time spent on discussion, however, when I read the judgement, I could find nothing to convince me of the conclusion reached by the Tribunal through its consideration of that Article. The Tribunal said nothing about the relationship between Article 8 of the Charter and the guidelines of the General Assembly. My delegation is convinced that the Tribunal should have addressed that article, should have examined it thoroughly and expressed an opinion on the relationship of the article to the General Assembly's guidelines. However, the Tribunal chose to keep silent and refrained from expressing an opinion on that matter, preferring, as it seems, to address the matter at a later date, probably in a future case. In short, the Tribunal postponed the matter notwithstanding the fact that the case in question was an appropriate occasion for the Tribunal to hand down a legal opinion in that respect.

I have already expressed my delegation's position with regard to this judgement, and pointed out that that position does not mean that this matter must, as a 100 per cent certainty, be brought before the International Court of Justice. However, it is the Committee's ambiguous legal framework that has led to my delegation's view of the judgement and its lack of belief that the case should be brought before the International Court of Justice. Article 11, paragraph 1, of the Statute of the Administrative Tribunal sets forth the legal framework within which the Committee is to function. However, that legal framework is ambiguous. It should be clarified in order that we may have a clear notion of what we are doing and of the justice that should be the Committee's ultimate goal.

If I were asked to clarify what I have just said and my reasons for believing the judgement to be deficient, I would say that my observations on

(Mr. Hanafi, Egypt)

the judgement regarding Mr. Fayache fall within this Committee's framework. That is to say that the Tribunal has failed to exercise its competence or that it has handed down a judgement that contravenes one of the Articles of the United Nations Charter. This could be said from one point of view.

However, owing to the ambiguity surrounding the Committee's working framework and to the fact that there is no clear definition of what may be construed as failure on the part of the Tribunal to exercise its competence, it seems to me that this Committee found itself unable to hand down an opinion and decide justly on this application.

In light of that ambiguity and in light of the lack of total conviction with regard to the need for the judgement to be brought before the Court in accordance with the present framework of this Committee, my delegation found that it should not take part in deciding the case, a position that should be regarded as a further message to United Nations bodies. I feel - and, indeed, as the representative of Senegal has said, I hope, that the discussion of this matter will send a message to the United Nations and its officials - that it is high time for necessary reforms to be undertaken vis-à-vis the Committee. The message my delegation wished to send by abstaining from participation in the decision-making process on this case is that the Committee must undertake the necessary reforms. The Committee must be given an opportunity to render justice - not to be a rubber stamp and vote "yes" or "no" without discussion - as I had occasion to notice during the course of the Committee's work.

The General Assembly has asked that the Committee be reformed but, unfortunately, the reform undertaken and the proposals put forward to reform

(Mr. Hanafi, Egypt)

or, at least, to provide the necessary interpretations of the legal framework within which the Committee works, so that our own work may be clearer. We are now working in the dark, we are working within a legal framework whose aims and implications are unclear, and if there are interpretations with regard to certain opinions of this framework, such interpretations have only added to the ambiguity of the Committee's work.

In conclusion, I should like to express the wish that true reform of the Committee will be undertaken. Having followed the Committee's work, I have tried to do something for the Committee, but I have not been granted the opportunity to succeed in my endeavour. However, whoever succeeds me will continue that endeavour, and I hope that the discussions that have been held at this session will serve as a beacon lighting the way to the reforms we all hope to see for our Committee.

Mr. WOOD (United Kingdom): I will not speak about the question of the mandate of the Committee, because I do not think this is the appropriate place to do so. I think it is for the General Assembly to consider the system of the administration of justice in the United Nations. And indeed as our colleague from Egypt has reminded us, it has done so at considerable length and is continuing to do so.

I explained in some detail at our meeting on 9 September the reasons for my conclusion that there was no substantial basis for Mr. Fayache's application on any of the grounds set forth in article 11 of the Statute of the Tribunal. There is, however, one aspect of this case on which I should like to explain my position at this meeting. It concerns the issues raised by the preferential guidelines for the promotion of women. The guidelines in question, which were dated 19 February 1987, like other measures giving preferential treatment to women in the Secretariat, such as quotas or targets and so on, do indeed raise issues of compatibility with the Charter and, in particular, with Article 101, paragraph 3, and with Article 8.

I think the applicant, Mr. Fayache, may indeed have been correct when he said in his application that the Tribunal

> "cannot avoid dealing with such an important issue forever, because sooner or later another case will reach the Tribunal."

The Tribunal did not in fact wholly avoid dealing with the issue in Mr. Fayache's case. In paragraph 7 of Judgement No. 507, it found that the technique used as a means of increasing the number of female candidates did not purport to authorize promotion of females whose relative qualifications or merits were lower than male collaterals, and thus did not appear to present any question under Article 101, paragraph 3, of the Charter. The clear implication of that passage in the Judgement is that, if rules or practices

(Mr. Wood, United Kingdom)

are applied that do result in the promotion of females whose relative qualifications or merits are lower than males, this would present a question under Article 101 - a question that the Tribunal should address.

The second part of the applicant's complaint about sex discrimination concerned Article 8 of the Charter, which provides that the United Nations should place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs. As the International Court said in the Yakimetz opinion, Article 8 of the Charter is generally understood to prohibit any discrimination on the basis of sex. Article 8 clearly applies to the employment of men and women in the Secretariat, which is one of the principal organs of the United Nations. The question whether preferential promotion guidelines or any other preferential treatment is compatible with Article 8 is clearly a matter which, in an appropriate case, the Tribunal may have to consider. And it is a question of law relating to a provision of the Charter within the meaning of Article 11 of the Statute of the Tribunal.

However, on the particular facts of the present case, the Tribunal found that it was not necessary to deal with these important issues. It stated that this case on its facts did not present the issues of sex discrimination sought to be raised by the applicant. Like other courts, the Tribunal acted quite properly when it avoided dealing with an issue that was not necessary for the disposal of the particular case before it.

(Mr. Wood, United Kingdom)

This case, however, should, I believe, serve as a warning to those who would seek to introduce rules and practices that contravene Article 101, paragraph 3, and Article 8 of the Charter. It is clearly essential that any rules and practices that may be adopted in this field should be understood to be subject to the overriding provisions of the Charter. Since on their face they may appear to contravene the Charter, it is important that any such rules should be expressly stated to be subject to the provisions of the Charter.

Mr. SOLOVIEV (Union of Soviet Socialist Republics) (interpretation from Russian): First, Mr. Chairman, I should like to thank you for your effective leadership in conducting the work of the Committee during the consideration of Judgement No. 507 of the Administrative Tribunal. We supported the decision of the Committee not to request an Advisory Opinion from the International Court of Justice because we feel, as do other delegations who participated in the decision which was taken, that the Committee, within its mandate, did not have any of the four grounds under Article 11 of the Statute for sending the matter to the International Court of Justice.

At the same time, the departures from the norms mentioned in the decision of the Tribunal, the so-called "irregularities", as well as the arguments put forward by the parties to the dispute, raise a number of more general issues. For example, with respect to the effectiveness of the existing system of evaluation of work, it follows from Article 101.3 of the Charter that in recruiting personnel, promoting them, granting permanent contracts, determining conditions of service, and so on, one should be guided mainly by the need to ensure the highest standards of effectiveness, competence and integrity. That broad interpretation of that Article was, inter alia, confirmed in the last resolution of the General Assembly on personnel.

(Mr. Soloviev, USSR)

It would seem that for those purposes there are performance reports designed to evaluate objectively and, what is most important, to support with documentation the fact that one staff member works very well, another staff member works well, another one works only satisfactorily, and so on. But the material of this case gives the impression that the existing system of evaluation is useless for filling a vacancy and for promoting someone.

In particular, the respondent's statement - this appears on page 5 of the English text of the Tribunal's decision - reads as follows:

"The non-submission of new performance reports is not a violation of due process."

Evidently, for the same reason, both the applicant and the respondent essentially use such arguments as years of service and such criteria as the right to consideration as an internal candidate or an external candidate, substantive or collateral, whether the applicant is a man or woman, whether the person's education corresponds to the job description, and so on.

While we understand all the complexities of this key problem in any bureaucracy - that is, the objective comparison of the work of staff, encouraging those who do a better job and stimulating those who do not do such a good job - we nevertheless feel that unless this problem is solved, the number of complaints of injustice and discrimination will grow, so that no system of justice will be able to cope, however many appeal steps we create in it. We feel that the attention of the relevant services of the Secretariat should be drawn to this problem and other questions arising out of the decision rendered by the Tribunal - in particular, the question raised by the distinguished representative of the United Kingdom. They should be asked to take administrative measures and, if necessary, to propose appropriate normative measures for consideration by the General Assembly.

The CHAIRMAN: If no other member of the Committee wishes to make a statement for the record, we turn to the application of Ms. Hamadeh-Banerjee.

The Committee on Applications for Review of Administrative Tribunal Judgements, having examined the application of Ms. Hamadeh-Banerjee at its closed meeting held on 9 September 1991, decided that there was no substantial basis for this application under Article 11 of the Statute of the Administrative Tribunal, and has therefore concluded that the International Court of Justice should not be requested to give an Advisory Opinion in respect of Judgement No. 509 delivered by the United Nations Administrative Tribunal in the case of Ms. Hamadeh-Banerjee against the Secretary-General of the United Nations.

Since there are no more speakers, I announce that this concludes the work of the Committee on Applications for Review of Administrative Tribunal Judgements at its thirty-seventh session.

The meeting rose at 11.45 a.m.